

90-10974

Supreme Court, U.S.  
FILED

DEC 26 1990

JOSEPH F. SPANIOLO, JR.  
CLERK

No. \_\_\_\_\_

IN THE SUPREME COURT OF THE UNITED STATES

October Term 1990

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In re: BERNARD J. DOLENZ, Petitioner

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PETITION FOR CERTIORARI

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Bernard J. Dolenz  
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Petitioner, Pro Se

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November 29, 1990

26



## QUESTIONS PRESENTED

I. DO FEDERAL COURTS HAVE ADMIRALTY JURISDICTION OVER A "VESSEL" THAT IS ABOUT 70% COMPLETE, UNDER CONSTRUCTION, AND NEVER COMMISSIONED?

II. DOES THE TRIAL COURT OFFEND DUE PROCESS RIGHTS OF AN OWNER TO DEFEND A DEFENDANT "VESSEL" BY REFUSING TO GRANT A HEARING?

## LIST OF ALL PARTIES

The parties to the proceedings below were the unfinished vessel "Aries Startrek", enrollment No. 555798 as Defendants, and Stuart Yacht Builders, Inc. was the Plaintiff. This was an in rem proceedings. Melissa Keyes was part owner in the vessel and transferred all of her interests to Bernard Dolenz.

G.N. Burdick is President of Stuart Yacht Builders, Inc. and has been represented by Steven Perry, P. O. Drawer 24, Stuart, FL 33495 and Thomas D. Lardin, 1901 W. Cypress Creek Road, #100, Ft. Lauderdale, FL 33309.

Initially, the Defendant vessel was represented by Robert & Reynolds, Suite 308, 319 Clematis Street, West Palm Beach, FL 33402. This case was before the Honorable William J. Zloch. Raymond Seese was the Plaintiff's marine expert.



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## OPINIONS BELOW

This unfinished vessel was arrested on July 10, 1986, and was tried on March 16, 1987 in a default posture. The Court had allowed the vessel's attorney to withdraw from the case on the morning of trial, refusing a Continuance, even though the Court a couple of days earlier had denied the Defendant's counsel his Motion to Withdraw as counsel for the Defendant.

Jurisdiction was challenged by Bernard Dolenz on March 18, 1987 when the Court refused to return his phone calls on March 16, 1987 when the Defendant's attorney abandoned the representation of the vessel. Eventually, after many Motions were before the Court, the Court denied Dolenz's Motion to Dismiss for Lack of Jurisdiction, for Intervention, and for Reconsideration on September 25,

1987. (Appendix 18-19).

Several Motions and supporting Briefs were given the Court regarding jurisdiction (Appendix 1-4; 7-17; 22-27), all of which culminated in the Court ruling adversely regarding the jurisdictional issue with an Order denying a hearing regarding jurisdiction 02/11/88 (Appendix 28-29).

The Trial Court as well as the Plaintiff failed to send notices of activity regarding the Defendant vessel even though repeatedly requested to do so. The Court never allowed a hearing before the Court even though repeatedly requested, and in fact gave an Order denying a Motion for Hearing 01/15/88. (DR 45) (Appendix 23-24).

While the Court entered a Judgment 02/16/88 in favor of Stuart Yacht Build-

ers, Inc., a final Judgment was entered 07/05/89 styled JUDGMENT FOR COSTS AND ORDER OF RELEASE AND/OR SALE (DR 73) (Appendix 30-36). This Judgment was timely appealed and after Briefs were submitted, the 11th Circuit affirmed the Trial Court's decision 08/20/90 (Appendix 37).

A Motion for Rehearing In Banc was denied by the 11th Circuit 10/16/90 (Appendix 52-53).

#### JURISDICTION

This Court has jurisdiction pursuant to 28 USCA Section 1254.

The Appellee invoked jurisdiction pursuant to 28 USC Section 1333 and 46 USC Section 971, which the Appellant/Respondent contends is improper as the "... vessel is incomplete, under construction,

and empty of equipment..." per the U.S. Marshall's return (R1-7 and 8; Appendix 49). Ray Seese's statement that the vessel has never been completely finished or commissioned (R1-38-4 and 5; Appendix 50), and G.N. Burdick's statement is a newspaper article that the boat was about 70% completed (R1-38-6 and 7; Appendix 51).

The Trial Court lacked jurisdiction as it failed to have the underpinning for a maritime contract as pointed out in Brief in Support of a Motion to Dismiss (R1-28), Brief to Support the Motion to Dismiss (R1-34-1 thru 7), Motion for Hearing regarding Jurisdiction and Brief (R1-47), and Memorandum of Law (R1-57-17 et seq).

The 11th Circuit, in an opinion filed December 6, 1989, indicated that the

Appeal from the United States District Court for the Southern District of Florida was timely noticed and indicated THIS APPEAL MAY PROCEED.

The decrees to be reviewed include the Order of the District Court denying the Motion to Dismiss for Lack of Jurisdiction, for Intervention, for Reconsideration on September 25, 1987 (DR 41); the Order denying the Motion for Hearing January 15, 1988 (DR 45); the Order denying Motion for Hearing regarding Jurisdiction on February 11, 1988 (DR 50); the Judgment rendered by the District Court on February 16, 1988 and the Judgment for Costs and Order of release and/or Sale dated 07/05/89 (DR 73); and the decisions of the 11th Circuit affirming the Trial Court's decision dated 08/20/90 and the denial of the Petition for Rehearing dated 10/16/90.



The Respondent herein seeks to invoke the jurisdiction of this Court pursuant to 28 USC Section 1651(a) for the review of all of the above stated Orders and Decisions, particularly those that deal with jurisdiction.

#### STATUTES INVOLVED

28 U.S.C. Section 1333. Admiralty, Maritime and Prize Cases

The District Court shall have original jurisdiction, exclusive of the Courts of the states, of:

(1) Any civil case of admiralty or maritime jurisdiction, saving to suitors in all cases all other remedies to which they are otherwise entitled.

46 U.S.C. Section 971. Persons entitled to lien

Any person furnishing repairs, supplies, towage, use of dry dock or

marine railway, or other necessities, to any vessel, whether foreign or domestic, upon the order of the owner of such vessel, or of a person authorized by the owner, shall have a maritime lien on the vessel, which may be enforced by suit in rem, and it shall not be necessary to allege or prove that credit was given to the vessel.

#### STATEMENT OF FACTS

The Defendant Aries Startrek had its wood infrastructure built in Tai Pai in 1968, being freighted to this county to have it finished. When the boat owner died, it remained in an estate for many years, being moored in a river. It was hauled from the river, after many years, to have it finished and commissioned. Stuart Yacht Builders, Inc. undertook work to finish this vessel, and to redesign the

hulls. When the work was unsatisfactorily done and with exorbitant costs, the Plaintiff sued in Admiralty in rem. The vessel was arrested on July 10, 1986 with a notation by the U.S. Marshall that the "vessel is incomplete, under construction, and empty of equipment". (R1-7 and 8; R1-12 and 13).

The owner contends that this boat had no business being in the Federal Court as the boat was unfinished, never commissioned, had no superstructure for sailing, and was never navigable or seaworthy as the motors and steering mechanisms were to be properly hooked up by Stuart Yacht. (R1-38-4 and 5; Appendix 50) (R1-38-6 and 7; Appendix 51).

Lyman Reynolds was hired to defend the Defendant Aries Startrek and wanted to withdraw as counsel which was denied on March 12, 1987. The Court called the

case to trial on March 16, 1987 and on that morning, the Court allowed Lyman Reynolds to withdraw as counsel, and at the same time denied continuing the case placing the Defendant Aries Startrek in a default posture. That same morning, the Court refused to accept telephone calls from Bernard J. Dolenz when the Court permitted Lyman Reynolds to abandon the Defendant Aries Startrek. TRANSCRIPT OF MELISSA KEYES, R1-48.

Notices were filed by Claimant Dolenz regarding the Intervention and various Motions to Dismiss for Lack of Jurisdiction. The Court remained insensitive to these Motions for over 6 months, then denied the Motions to Dismiss for Lack of Jurisdiction, for Intervention, and for Reconsideration on September 25, 1987. The Zloch Court refused even to allow a hearing by Bernard J. Dolenz in his

Court, and in fact, Dolenz has never even seen the Judge to this date. (Appendix 20-24).

Subsequently, the Court entered a Judgment February 22, 1988 and July 5, 1989. A timely appeal was perfected and the 11th Circuit affirmed the Trial Court, and denied a Motion for Rehearing.

#### SUMMARY OF THE ARGUMENT

I. THE TRIAL LACKS JURISDICTION AND ALL ORDERS FROM THE TRIAL COURT SHOULD BE VOIDED.

Lack of jurisdiction is plain as there is no underpinning for maritime contract pursuant to 28 USC Section 1333 and 46 USC Section 971. Stuart Yacht invoked the invoked the jurisdiction improperly as the vessel was never finished, commissioned and was still under construction.

evidence,

(1) U.S. Marshall upon arresting the vessel 07/10/86 stated: " ... vessel is incomplete, under construction, and empty of equipment..." ((R1-7 and 8; Appendix 50);

(2) Ray Seese, Plaintiff's expert and Marine surveyor states that the vessel has never been completely finished or commissioned...(R1-38-4 and 5; Appendix 50);

(3) Statements of Burdick in a local newspaper article that the Boat is about 70% completed. (R1-38-6 and 7; Appendix 51).

II. THE TRIAL COURT ABUSED ITS DISCRETION IN NOT ALLOWING THE OWNER BERNARD J. DOLENZ DUE PROCESS TO DEFEND THE DEFENDANT VESSEL.

In this regard, the Zloch Court abused its discretion by allowing the Defend-

ant's attorney to withdraw as counsel on the morning of trial even though Lyman Reynolds knew that both Melissa Keyes and Bernard J. Dolenz had an interest in the vessel. A couple of days earlier, the Zloch court denied this lawyer's Motion to Withdraw as Counsel. The Court allowed the Defendant vessel to be placed in a default posture and ignored the telephone calls to the Court by Bernard J. Dolenz when Lyman Reynolds was allowed to abandon his client for which he was hired and without allowing a Continuance. This conduct seems abhorrent to any system of justice, and neither the Court nor the Plaintiff sent notices to the owner, Bernard J. Dolenz, even though requested to do so.

#### ARGUMENT

Stuart Yacht was to assist in finishing

and building an unfinished vessel, and therefore the work that it had done on the boat could not be grounded in a maritime contract as this relationship did not directly concern navigation or commerce on navigable waters. GENERAL ENGINE & MACH. WORKS, INC., V. SLAY, D.C. Ala. 1963, 222 F. Supp. 745; NILO BARGE LINE, INC. V. M/V BAYOU DULARGE, CA MO. 1978, 584 F. 2d 84; and TROPWOOD A.G. V. TAE CHANG WOOD INDUSTRY CO., LTD. D.C. ILL. L978, 454 F. Supp. 964.

The law seems well-settled in GENERAL ENGINE & MACHINE WORKS, INC., supra, which states in a similar situation to the unfinished, uncommissioned Aries Startrek:

'... in order for a maritime lien to arise out of a contract, the contract itself must be of a clearly maritime nature. 2 C.J.S. Admiralty 24.

A maritime contract is an agreement which concerns transportation by sea, relates to navigation or maritime employment, or



involves navigation and commerce on navigable waters. 2 C.J.S. Admiralty 24, note 23.

If a contract is not directly or substantially related to navigation, even though it is to be performed on water, or on board, or for the benefit of a vessel, such contract cannot be enforced in a court of admiralty. The W. T. Blunt, D.C. Mich., 291 F. 899 (1923).

It is well settled that a contract to build a ship is non-maritime and is not within the jurisdiction of admiralty tribunals. THAMES TOWBOAT CO., V. THE 'FRANCIS McDONALD', 254 U.S. 242, 41 S. Ct. 65, 65 L. Ed. 245 (1920). In that case, hull had been completed and launched. The original builder found itself unable to proceed further and after an agreement with the owner, the appellant towed the hull to another location. More work was accomplished on the hull while it was in possession of the Appellant. The ship was manifestly incomplete when the Appellant received it. The masts were not in, nor were the bolts, beams, and gaff. The forward house was not constructed and she was not in 'condition to carry on any service'. The Appellant worked on the vessel for some six weeks.

The Court was faced squarely with the same issue in The "Francis McDonald" that is presented to this Court in the instant case; ie., whether a contract to furnish materials, work, and labor for the completion of a vessel not sufficiently advanced to discharge the functions for which intended is within the admiralty and maritime jurisdiction of the Federal

## Courts.

The Court held that there was no federal jurisdiction in the cause and stated, 254 U.S. p. 244, 41 S.Ct. p 66, 65 L. Ed. 245;

'Notwithstanding possible and once not inappropriate criticism, the doctrine is now firmly established that contracts to construct entirely new ships are non-maritime because not nearly enough related to any rights and duties pertaining to commerce and navigation'.

Further, 254 U.S. at p. 245, 41 S. Ct. at p.66, 65 L. Ed. 245:

'...we think the same reasons which exclude such contracts from admiralty jurisdiction likewise apply to agreements made after the hull is in the water, for the work and material necessary to consummate a partial construction and bring the vessel into condition to function as intended'.

It is apparent to the Court that the decisions are harmonious and the law well settled with respect to the rule that all work accomplished before a vessel is actually launched is regarded as original construction.

THE ARIES STARTREK BEING APPROXIMATELY 70% COMPLETE IS NOT A "VESSEL" FOR PURPOSES OF ADMIRALTY JURISDICTION.

In ROSETTI V. AVONDALE SHIPYARDS, INC.,

821 F. 2d 1083 (5th Circuit 1977), the Court addressed on what constitutes a vessel. While this definition deals with a vessel negligence claim under the Longshore and Harbor Workers' Compensation Act, this same definition should also apply to other statutes as well. ROSETTI states:

Unfinished vessel, which was approximately 80% to 85% complete, was not navigable, was "separate entity", was not "vessel" for purposes of admiralty jurisdiction, and therefore, was not "vessel" for purposes of vessel negligence claim under Longshore and Harbor Workers' Compensation Act, even though hull was afloat on navigable waters, where vessel itself was not navigable, where majority of navigation equipment was not installed, where dock trials and sea trial had not taken place, and where no crew had been assigned to vessel. Longshore and Harbor Workers' Compensation Act, s 5 (b), 33 U.S.C.A. s 905 (b); 1 U.S. C.A. s 3.

Lack of jurisdiction may be raised at any time, and when raised, must be examined and decided. ARMSTRONG CORK CO. V. FARREL LINE INC. , 81 Fed Sup 848 (DC Pa

1948).

Here, the Trial Court would not allow a hearing to examine the jurisdictional issue and the 11th Circuit did not seem to address whether or not an unfinished or uncommissioned vessel could have jurisdiction in a Federal Court. It is the Respondent's contention that an unfinished and uncommissioned vessel should not be in Federal Court in Admiralty, and the Briefs given in the Appendix, as well as case law *supra*, suggest that the Trial Court erred in keeping this case before the Court, particularly when the jurisdictional question was brought to the Court's attention.

THE TRIAL COURT ABUSED ITS DISCRETION IN NOT ALLOWING THE OWNER BERNARD J. DOLENZ DUE PROCESS TO DEFEND THE DEFENDANT VESSEL.

Bernard J. Dolenz, as owner, has been deprived of due process, as he has not had a hearing or been given an opportunity to defend the vessel, even if the Court had jurisdiction. COLLINS V. WOLFSON, 498, F2d 1100; U.S.C.S. CONST. AMEND. 14, BURNLEY V. THOMPSON, 524 F 2d 1233; AND CHRISTHILF V. ANNAPOLIS EMERGENCY HOSPITAL ASS'N, INC. 496 F 2d 174, appeal after remand 552 F 2d 1070.

Furthermore, the Zloch Court abused its discretion in allowing attorney Lyman Reynolds to withdraw on the morning of the trial without giving a continuance. This placed the Defendant Aries Startrek in a default posture.

In VILLEGAS V. CARTER, 711 S.W. 2d 624 (Tex 1986) the Trial Court abused its discretion in denying a Motion to Continuance after allowing the attorney to voluntarily withdraw two days before

trial where the client was not negligent or at fault in causing his attorney's withdrawal, the client had too short a time in which to find a new attorney and to have that attorney investigate the case and prepare for trial.

Similarly a Trial Court abused its discretion by denying continuance, and client was prejudiced thereby, where client had little or no advance notice that her counsel would withdraw on morning of trial of a complex matter. MILLS V. MILLS, 232 Va 94, 348 S.E. 2d 250, 3 VLR 549. Most jurisdictions have similar case law. 17 Am Jur 2d 130.

#### CONCLUSION

The Petitioner, Bernard J. Dolenz, prays that this Honorable Court review the foregoing reasons and rule that the Trial Court below lacked jurisdiction, and that

all Judgments and Orders be voided for lack of jurisdiction; alternatively, that in the event that this Court considers the Federal Court to have jurisdiction, that this case be remanded for trial as due process has been denied the Petitioner; that Rule 11 Sanctions be imposed on the Respondent because of its persistence in prosecuting this case in Federal Court knowing that the Aries Startrek was never finished, under construction, and never commissioned; and for general relief.

Respectfully submitted,

Bernard J. Dolenz

CERTIFICATE OF SERVICE

This is to certify that a copy of the foregoing instrument has been sent by regular mail on this the \_\_\_\_ day of December, 1990 to Thomas Lardin, 1901 W. Cypress Creek Road, #100, Ft. Lauderdale, FL 33309.

Bernard J. Dolenz

ORAL ARGUMENT REQUESTED

(2)

No. 90-1097

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U.S. SUPREME COURT

IN THE SUPREME COURT OF THE UNITED STATES

October Term 1990.

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In re: BERNARD J. DOLENZ, Petitioner

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APPENDIX TO THE  
BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI

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February 13, 1991



## QUESTIONS PRESENTED

1. Should this Court entertain a Petition for Certiorari on issue of the District Court's exercise of its admiralty jurisdiction where the District Court's jurisdiction is predicated upon a finding of fact.

2. Did the trial court offend traditional concepts of due process by proceeding to trial where no Motion for Continuance of the Trial had been sought or requested.

## LIST OF PARTIES

The parties to the proceedings below were the vessel "Aries Startrek", enrollment No. 555798 and the Plaintiff below, Stuart Yacht Builders, Inc. Melissa Keyes filed a claim of owner in accordance with Supplemental Rule C(6). The case was tried before the Honorable William J. Zlock.

The present petitioner, Bernard Dolenz, filed no pleadings in the district court until after the trial of this matter was held. Dolenz has never intervened nor has he filed an appearance as attorney on behalf of the Defendant vessel "Aries Startrek".

Dolenz apparently is appearing pro se in this proceeding. It should, however, be pointed out that the Defendant below was never Dolenz but rather was the Defendant vessel "Aries Startrek" for whom he has never appeared.

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## OPINIONS BELOW

The Final Judgment of the District Court for the Southern District of Florida has not been reported. A reprint of this opinion is attached in the Appendix hereto at page 1.

The Order of the District Court for the Southern District of Florida denying the motions of Bernard Dolenz to dismiss, for intervention, and for reconsideration has not been published. A reprint is attached in the Appendix hereto at page 17.

The Order of the District Court for the Southern District of Florida denying Petitioner's Motion for Substitution has not been reported. A reprint is attached in the Appendix hereto at page 19.

The decision of the Eleventh Circuit Court of Appeals dismissing the appeal of Bernard Dolenz has not been reported. A reprint of that Order is attached in the Appendix hereto at page 26.

The decision of the Eleventh Circuit Court of Appeals denying the Petition for Prohibition or Mandamus of Bernard J. Dolenz has not been reported. A reprint of that Order is attached in the Appendix hereto at page 28.

## JURISDICTION

The District Court's jurisdiction emanates from 28 U.S.C. Section 1333 and 46 U.S.C. Section 971. This case was tried to the Court on March 16, 1987. The District Court entered a Final Judgment on February 16, 1988.

This Court's jurisdiction for purposes of consideration of the Petition for Certiorari emanates from 28 U.S.C. Section 1254.

## STATUTES INVOLVED

28 U.S.C. Section 1333. Admiralty,  
Maritime and Prize cases

The District Court shall have

original jurisdiction, exclusive of the courts of the states, of:

(1) Any civil case of admiralty or maritime jurisdiction saving to suitors in all cases all other remedies to which they are otherwise entitled.

46 U.S.C. Section 971. Persons entitled to lien

Any person furnishing repairs, supplies, towage, use of dry dock or marine railway, or other necessities, to any vessel, whether foreign or domestic, upon the order of the owner of such vessel or of a person authorized by the owner, shall have a maritime lien on the vessel, which may be enforced by suit in rem, and it shall not be necessary to allege or prove that credit was given to the vessel.

#### STATEMENT OF THE FACTS

Respondent, Stuart Yacht Builders, Inc., filed an in rem action against the Defendant vessel "Aries Startrek" in the District Court in and for the Southern District of Florida. The vessel was seized by the United States Marshal on July 10, 1986, and Stuart Yacht

Builders, Inc. was designated as substitute custodian. On August 4, 1986, Melissa Keyes filed an Answer and Affirmative Defenses on behalf of the vessel as owner of the vessel. The case was tried to the Honorable William Zlock on March 16, 1987. (the transcript is contained in the Appendix at pages 31 - 53)

The Court called the case on the morning of March 16, 1987. At that time the Court was advised by counsel for Melissa Keyes and by Melissa Keyes that she had transferred her ownership interest in the vessel to Bernard Dolenz on the preceding day. Melissa Keyes further advised the Court that she had no authority to represent the new owner Bernard J. Dolenz and that her legal counsel had no authority to represent the "new" owner. Melissa Keyes further represented that neither she nor the attorney had any authority or had been requested to request a continuance on behalf of Bernard Dolenz. Bernard Dolenz filed nothing.

The Court made further inquiry of Melissa Keyes and determined that Bernard Dolenz had been a partner in the vessel for some months prior to the date of the trial. Dolenz, an attorney, was aware that the trial of this cause was to occur on March 16, 1987 but did not communicate in any fashion with the Court and had not requested a continuance.

The Court accepted evidence and testimony from Stuart Yacht Builders, Inc. and no one responded when the Defendants case was called.

Dolenz filed a Notice of Appeal with the 11th Circuit which appeal was dismissed for lack of jurisdiction because the notice was untimely filed. Dolenz then filed a Notice for Reconsideration of the 11th Circuit's dismissal which was denied on September 29, 1988. A Petition for Writ of Mandamus and/or Prohibition in the 11th Circuit Court of Appeals was filed on October 1, 1987, which was denied on October 21, 1987. Dolenz then



filed a Petition for Writ of Prohibition or Writ of Mandamus in this Court, Case Number 88-971, which petition was denied on February 21, 1989.

Dolenz has previously also filed a Petition for Certiorari with this Court, Case Number 88-1407, which was denied April 17, 1989. That petition, similar to the petition now before the Court, raised as questions the District Court's jurisdiction and the District Court's proceeding to trial when it did on March 16, 1987. The District Court, in its Conclusions of Law, specifically found as a matter of fact and law that the defendant vessel was a vessel within the meaning of 46 U.S.C. Section 971. Premised on that fact, the Court found that the action below was an admiralty and maritime claim within the meaning of Rule 9(h) and that the Court had subject matter jurisdiction over the vessel.

REASONS FOR NOT GRANTING THE PETITION FOR  
CERTIORARI

Petitioner, DOLENZ, in essence seeks by this Petition a third attempt to have this Court become involved in the fact finding which occurred at the trial level which ultimately led to the conclusion that the District Court had subject matter jurisdiction over the Defendant vessel. Petitioner further seeks, once again, to have this Court review the Trial Court's decision to proceed with trial based upon the situation before the Court at the time that the case was called. On both prior occasions this Court has declined to exercise its discretion in favor of granting the relief sought. (Case No. 88-971 and Case No. 88-1407).

The decision of the District Court, affirmed on appeal, was that the "Aries Startrek" was a vessel within the meaning of

28 U.S.C. Section 1333 and 46 U.S.C. Section 971. That determination of the vessel status necessarily and absolutely involved the resolution of questions of fact by the District Court based upon the evidence which was before it. Based upon that evidence, the District Court concluded that it had jurisdiction pursuant to 28 U.S.C. Section 1333. The Court further concluded that the "Aries Startrek" was a vessel within the meaning of 46 U.S.C Section 971. The Court likewise concluded that the services rendered to the vessel by Stuart Yacht Builders, Inc. were within the scope of 46 U.S.C. Section 971. The Court therefore concluded that Stuart Yacht Builders, Inc. was entitled to a maritime lien pursuant to 46 U.S.C. Section 971 and to a Judgment foreclosing that lien.

Similar to the situation where a Writ of Mandamus or Prohibition is sought, a Petition for Certiorari should not be used to review the fact finding of the trial court. In re:

Muir vs. Gleneden 254 U.S. 522 (1921). While that case dealt with prohibition and mandamus, the same logic can be employed here in as far as the jurisdiction of the District Court was, at best case for Dolenz, in doubt. Because the District Court's jurisdiction was at best case for Dolenz in doubt, it was incumbent upon Dolenz to do more than assert or call into question the issue of jurisdiction. It was incumbent upon Dolenz, at the appropriate time which was at trial, to produce whatever proof and/or evidence which was necessary to sustain his position that the District Court lacked jurisdiction.

On the issue of due process, the evidence produced at the trial of this cause was such that Dolenz maintained an interest in the vessel for months prior to the trial and received a transfer of 100% interest in the vessel prior to the commencement of the trial. Also prior to the commencement of the trial and at the time that Dolenz accepted the

transfer of complete ownership of the vessel, Dolenz was aware of the date of the trial. Dolenz, however, did not retain counsel to appear on his behalf and asked for a continuance, Dolenz did not ask for a continuance on his own behalf, and Dolenz did not authorize the prior owner, Melissa Keyes, to request a continuance on his behalf. Dolenz simply did not attend.

On that record the District Court held the trial at the appointed time. It can hardly be said that the District Court abused its discretion for denying a continuance when none was ever requested.

## CONCLUSION

In conclusion, it is respectfully requested that the Petition for Certiorari be denied. This Court has previously denied Petitioner's request for the same or similar relief on two separate occasions. It is respectfully requested that this Honorable Court, in its Order of Denial, remand this matter to the District Court for the imposition of sanctions against Dolenz pursuant to Rule 11, Federal Rules of Civil Procedure and Rule 38, Federal Rules of Appellate Procedure, in the form of the unnecessary attorney's fees which Dolenz has caused to be expended by Respondent, Stuart Yacht Builders, Inc.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. Mail on this the 19th day of February, 1991 to: BERNARD J. DOLENZ, 6102 Swiss Avenue, Dallas, Texas 75214.

THOMAS D. LARDIN  
Attorney for Stuart Yacht  
1901 W. Cypress Creek Rd.  
Suite 100  
Ft. Lauderdale, FL. 33309  
(305) 938-4406

By: \_\_\_\_\_  
THOMAS D. LARDIN

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90-1097

Supreme Court, U.S.  
FILED

DEC 26 1990

JOSEPH F. SPANIOL, JR.  
CLERK

No. \_\_\_\_\_

IN THE SUPREME COURT OF THE UNITED STATES

October Term 1990

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In re: BERNARD J. DOLENZ, Petitioner

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APPENDIX FOR PETITION FOR CERTIORARI

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Bernard J. Dolenz  
6102 Swiss Avenue  
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(214) 821-0220  
TX Bar No. 05957750  
Petitioner, Pro Se

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Counsel for Stuart Yacht  
Builders, Inc.

November 29, 1990

350P



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UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF FLORIDA - ADMIRALTY  
DIVISION

STEWART YACHT BUILDERS, INC.,

Plaintiff

VS.

NO.

8668384-CIV-Zloch

ARIES STAR TREK, enrollment  
#55798, together with all  
tackle and apparel

BRIEF IN SUPPORT OF  
MOTION TO DISMISS; MOTION TO RECONSIDER  
TO THE HONORABLE JUDGE OF SAID COURT:

THE COURT HAD NO JURISDICTION AS THE  
MERITIME LIEN WAS DEFECTIVE AS THERE WAS  
NO UNDERLYING MARITIME CONTRACT.

The underlying action against the  
Defendant vessel is defective as it is  
basically a dispute over charges, and is  
not grounded in a maritime contract.  
GENERAL ENGINE & MACH. WORKS, INC. V.  
SLAY, D.C. Ala. 1963, 222 F. Supp. 745  
holds: "If contract is not directly or  
substantially related to navigation,  
even though it is to be performed on

water, or on board, or for benefit of vessel, it cannot be enforced in admiralty court."

THE VESSEL IS IN THE PROCESS OF BEING BUILT AND HAS NEVER BEEN FINISHED, AND THEREFORE CANNOT BE GROUNDED IN A MARITIME CONTRACT

NILCO BARGE LINE, INC. V. M/V BAYOU DULARGE, CA NO. 1978, 584 F 2D 84 holds: "Contract for building or supplying materials for original construction and outfitting of ship is not maritime contract."

TROPWOOD, A.G. V. TAE CHANG WOOD INDUSTRY CO., LTD. D.C. ILL. 1978, 454 F. Supp. 964 holds: "In general, to invoke admiralty jurisdiction over a contract, subject matter must be wholly maritime in nature; contract must directly concern navigation or commerce on navigable waters."

MELISSA KEYES HAD EQUITABLE TITLE TO THE DEFENDANT VESSEL MARCH 16 AS THE

ASSIGNMENT TO BERNARD DOLENZ HAD NOT BEEN DELIVERED TO HIM OR HIS ATTORNEY, AND HER ATTORNEY SHOULD NOT HAVE BEEN PERMITTED TO WITHDRAW UNDER THE CIRCUMSTANCES; OR IF PERMITTED, THE TRIAL SHOULD HAVE BEEN CONTINUED.

"Where the assignment is by a written instrument, simply signing or acknowledging the instrument is not sufficient to transfer the property, and delivery of the instrument is necessary to complete the assignment. "HEYMAN V. KLINE, D.C. Conn., 344 F. Supp. 1088, affm in part and reversed in part on other grounds, D.A., 456 F2d 123, cert. den. 93 S. Ct. 53, 409 U.S. 847, 34 L. Ed. 2d 88.

So, the mere endorsement of a transfer on an instrument without proof of delivery, will not be sufficient to establish the assignment thereof.

ILLINOIS POWDER MFG. CO. V. SECURITY



(CAPTION)-U.S. DISTRICT COURT

CLAIM OF BERNARD J. DOLENZ

COMES NOW, BERNARD J. DOLENZ, and presents his claim as follows:

1. BERNARD J. DOLENZ is the owner of the seized property identified as the "ARIES STARTREK, ENROLLMENT NO. 555798, TOGETHER WITH ALL TACKLE AND APPAREL", of said vessel. On March 14, 1987, an agent of Melissa Keyes gave an oral assignment of the above seized property to Bernard J. Dolenz in Dallas, TX which was ratified subsequently by Melissa Keyes, said assignment being notarized March 23, 1987, and being delivered in Dallas, TX on March 26, 1987 to Bernard J. Dolenz.

2. BERNARD J. DOLENZ is the owner of the aforementioned vessel and any of its



tackle, apparel, appurtenances and other equipment in the possession of the Plaintiff, both at the shipyard at 450 Southwest Salerno Road, Stuart, Florida, 33494, the Mini Bay Use Storage, at 1105 N.E. Industrial Boulevard, Jensen Beach, Florida, storage bin no. 199 and any other location to which any of the appurtenances, tackle and other equipment at whatever location said equipment has been removed and placed.

3. BERNARD J. DOLENZ, as the owner of the "ARIES STARTREK" and its tackle, appurtenances, apparel and equipment demands its restitution and the right to defend this action.

---

Bernard J. Dolenz

(Notarized April 3, 1987)

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF FLORIDA  
ADMIRALTY DIVISION  
CASE NO. 86-8384-CIV-ZLOCH

STEWART YACHT BUILDERS, INC.,  
Plaintiff

VS.

ARIES STAR TREK, enrollment  
#55798, together with all  
tackle and apparel

Defendant.

---

BRIEF TO SUPPORT THE MOTION TO DISMISS  
TO THE HONORABLE JUDGE OF SAID COURT:

THE COURT LACKS JURISDICTION

The Plaintiff assumes that jurisdiction exists choosing for his own reason to have this case decided by an admiralty court hoping that the jurisdictional point may be easily over-looked by the Court when it is dealing with the contract having a nautical favor.

An inspection of the Plaintiff's documents confirm that exploratory carpentry, design and engineering, keel fabrication, design engineering and consultation, placing in a steering system, and alterations to the vessel all relate to the original construction of the vessel. EXHIBIT "A"

This contract, being one for services of a ship, does not furnish a basis for a claim within the admiralty jurisdiction provided for in 28 USCS Section 1333(1). In *Bond v. F/V Mermaid* (1970, DC Fla) 311 F. Supp 1013, a naval architect filed a complaint in rem against a vessel for alterations and additions to its plans ordered by the owners of the Defendant vessel, asserting admiralty jurisdiction, but the Court found that the extra work performed, that is, drafting, conferences, calculations, and the like, all related to the original construction of the vessel, and that

services furnished under the later agreement for changes were supplied in contemplation of completing the original undertaking for the design and supervision of the vessel's construction. This contract, being one for services furnished in the construction of a ship, does not furnish a basis for a claim within the admiralty jurisdiction provided for in 28 USCS Section 1333 (1), the Court concluded.

The Plaintiff's own invoices and statements indicate that Mr. Burdick knew that the boat was "only about 70% completed". EXHIBIT "B". In EXHIBIT "B", Burdick indicates that he is in the process of re-designing the unfinished boat. the bottom-side still required interior finishing, installation of wiring, plumbing, steering mechanisms, engine fittings, desk fittings, masts and riggings. The boat was never

completed because of lack of funds to complete her by the previous owners.

Lack of jurisdiction may be raised at any time, even upon a second appeal of an action in which the point was never raised in the trial court, and was not advanced in a previous appeal- (Flota Maritima Browning de Cuba, Sociedad Anonima v. Snobl (1966, CA4 Md) 363 F2d 733, cert den 385 US 837, 17L Ed 2d 71, 87 S Ct 82), and when raised must be examined and decided (Armstrong Cork Co. v. Farrell Line, Inc. (1948, DC Pa) 81 F Supp 848). Or the court itself may raise the issue, and, consequently, Plaintiff's counsel must be prepared to demonstrate admiralty jurisdiction to a court's satisfaction, and his failure to cary this burden when called upon by the Court, even though Defendants counsel also argues to the Court that there is no problem as to jurisdiction, will result in dismissal (Rhederei Actien

Gesellschaft Oceana v. Clutha Shipping Co. (1915, DC Md 226 F 339).

Agreements for alterations and additions to plans ordered by the owners are not maritime contracts and, hence, not within the purview of admiralty jurisdiction. This holding has been repeated many times by decisions of the United States Supreme Court beginning in 1857 with *People's Ferry Co. v. Beers* (1857) 61 US 393, 15 L Ed 961. *People's Ferry* held that District Courts of the United States had no jurisdiction to proceed in admiralty to enforce liens for labor and materials furnished in constructing vessels to be employed in the navigation of waters to which the admiralty jurisdiction extends, pointing out that liens on vessels encumber commerce.

The Court said that it would be a strange doctrine to hold the ship bound in a case where the owner made the

contract in writing, charging himself to pay by installments for building the vessel at a time when she was neither registered nor licensed as a seagoing ship, and that as to the contract being purely maritime and touching rights and duties appertaining to navigation, it was a contract made on land, to be performed on land, the wages of the shipwrights having no reference to a voyage to be performed, so that they were bound to rely on their contract.

In *Thames Towboat C. v. The Schooner "Francis McDonald"* (1920) 254 US 242, 65 L Ed 245, 41 S C t 65, the United States Supreme Court held that the Plaintiff's contract to furnish materials, work, and labor for her completion made after the schooner was launched BUT WHILE NOT SUFFICIENTLY ADVANCED TO DISCHARGE THE FUNCTIONS FOR WHICH SHE WAS INTENDED, was not within the admiralty and maritime jurisdiction. (Emp. added).

THE DEFENDANT "ARIES STAR TREK" IS NOT A  
VESSEL

"The word 'vessel' includes every description of watercraft or other artificial contrivance used, or capable of being used, as a means of transportation on water." Act of July 18, 1896 Ch 201 Section 1, 14 Stat 178, incorporated into the Revised Statutes as Section 3.

The "Aries Star Trek" has never been seaworthy, and has never been capable of being used as a means of transportation on water. Basically, this is why the "Aries Star Trek" was placed in the Plaintiff's hands so that she could become seaworthy. The Defendant never had a crew or machinery in operation that would make it navigable.



ALTERNATIVELY, DEFENDANT "ARIES STAR TREK" WAS A "DEAD SHIP".

Assuming that the Plaintiff contends that the Defendant "Aries Star Trek" was launched, which is denied by the Defendant, it should be clear that the "dead ship" doctrine would apply as the Defendant was withdrawn from any maritime activity or navigation and therefore would not fall within the admiralty jurisdiction. "A ship is made to plough the seas, and not to lie at the walls." The *Poznan* (1925, CA2 NY) 9 F 2d 838, revd on other grounds *New York Dock Co. v. The Poznan*, 274, US 117, 71 L Ed 955, 47 S Ct. 482.

...  
In *Nanna v. The Meteor* (1950, DC NY) 92 F. Supp 530, affd (CA2) 184 F2d 439, cert den 349 US 933, 95 L Ed 673, 71 S Ct 497, the *Meteor* had been part of a reserve fleet which was purchased by the Plaintiff from the US Maritime

Commission. The boat's Coast Guard Certificate of Inspection had expired, as had her Certificate of Enrollment and license with the Bureau of Customs. The vessel was towed to New York where painting services were performed, and during that period it had no crew, light, heat, or power, and no machinery in operation. The Court found that in order for the Meteor to have been returned in navigation and commerce, there would have been required very extensive repairs AND PROPER DOCUMENTATION, and concluded that the Meteor was a "dead" ship.

This is analagous to the Defendant "Aries Star Trek" as it needs extensive work before it can even be seaworthy, and will require proper documentation before it can be returned for navigation and commerce.

The "dead ship" doctrine was considered in Hercules Co. v. The Brigadier General

Absolom Baird (1954, CA3 NJ) 214 F2d 66, where the District Court found as fact that at the time of labor and services for which a maritime lien was sought, the vessel "was not in commission and she was unable to sail, " and concluded that no maritime lien arose under 46 USC Section 971.

The Defendant is not in commission and is not able to sail as the top-side has never been out-fitted with masts and rigging.

#### PRAYER

WHEREFORE, PREMISES CONSIDERED, the Defendant prays of the Court to dismiss this action as it lacks jurisdiction, there was no maritime contract the Defendant "Aries Star Trek" is not a vessel as defined in Admiralty Law; and alternatively, that the Defendant is a "dead ship", and for Rule 11 Sanctions

against the Plaintiff as the Court may deem proper for the vexatious and frivolous lawsuit brought into this Court without jurisdiction; and for costs of Court and attorney fees, expended in defending this case; and for general relief.

Respectfully submitted,

Bernard J. Dolenz, J.D., M.D.

#### CERTIFICATE OF SERVICE

On the 4th day of April, a copy of the foregoing instrument and Claim of Bernard J. Dolenz was sent by regular mail to Steven Perry, P.O. Drawer 24, Stuart, FL 33495-0024.

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 86-8384-CIV-ZLOCH

STUART YACHT BUILDERS, INC.,  
a Florida corporation,

Plaintiff,

vs.

ORDER

ARIES STARTREK, Enrollment  
No. 555798, together with  
all tackle and apparel,

Defendant.

---

THIS MATTER is before the Court upon the Motion for Intervention (DE 25), the Motion To Dismiss and Motion To Reconsider (DE 27) and the Motion for Sanctions (DE 35) filed herein by Bernard Dolenz and the Court having reviewed the merits of said Motions, having reviewed the court file and being otherwise fully advised in the premises, it is

ORDERED AND ADJUDGED as follows:

1. The Motion For Intervention (DE 25) filed herein by Bernard Dolenz be and the same is hereby DENIED;

2. The Motion to Dismiss And Motion to Reconsider (DE 27) filed herein by Bernard Dolenz be and the same is hereby DENIED; and

3. The Motion for Sanctions (DE 35) be and the same is hereby DENIED.

DONE AND ORDERED in Chambers at Fort Lauderdale, Broward County, Florida, this 25th day of September, 1987.

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WILLIAM J. ZLOCH  
United States District Judge

Copies furnished:  
Bernard Dolenz,  
Stephen Perry, Esq.

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF FLORIDA -  
ADMIRALTY DIVISION

STUART YACHT BUILDERS, INC.  
Plaintiff,  
V.  
ARIES STARTREK,  
Defendant.

No. 86-8384-CIV-ZLOCH

(Filed January 4, 1988)

MOTION FOR HEARING

COMES NOW, Bernard J. Dolenz, owner of the Defendant, Aries Startrek, and respectfully moves this Court for an Order for a Hearing, and for grounds would show as follows:

1. There is pending before this Court the Defendant's Second Motion to Dismiss, and Alternatively, to Increase Insurance and to Impose Sanctions for Failure to Maintain the Vessel. This Motion was sent October 12, 1987.

2. The unfinished craft is still dete-

riorating under the care of the Plaintiff, even though the Plaintiff had assured the Court that it would take care of the craft properly.

3. These delays have caused the Defendant craft serious harm and deterioration, and therefore there is urgency to have this Honorable Court make a disposition. The Defendant urges that this case is inappropriately before this Court for the reasons previously given, and this Defendant urges that this case be dismissed with appropriate relief for the harm done to the craft while under the stewardship of the Plaintiff.

Respectfully submitted,

Bernard J. Dolenz, J.D., M.D.

NOTICE OF MOTION

TO: Steve Perry, P. O. Drawer 24, Stuart,  
FL 33495-0024. .

Please take notice that on \_\_\_\_, 1988, at



\_\_\_ o'clock \_\_\_.m. or as soon thereafter as  
counsel can be heard, in Room \_\_\_, United  
States Courthouse, the undersigned will  
bring the Second Motion to Dismiss, and  
Alternatively, to Increase Insurance and  
to Impose Sanctions for Failure to Main-  
tain the Vessel on for hearing.

DATED: December 31, 1987.

Bernard J. Dolenz, J.D., M.D.

#### CERTIFICATE OF SERVICE

This is to certify that a copy of the  
foregoing instrument was sent by regular  
mail to Steven Perry, P. O. Drawer 24,  
Stuart, FL 33495-0024 on this the 31st  
day of December, 1987.

Bernard J. Dolenz, J.D., M.D.

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 86-8384-CIV-ZLOCH

STUART YACHT BUILDERS, INC.

a Florida Corporation,

Plaintiff,

v.

ORDER

ARIES STARTREK, ENROLLMENT

NO. 555798, TOGETHER WITH

ALL TACKLE AND APPAREL,

Defendant.

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THIS MATTER is before the Court upon the Motion For Hearing (DE 44) filed herein by Bernard J. Dolenz, and the Court having carefully considered the merits of said Motion, having reviewed the court file and being otherwise fully advised in the premises, it is

ORDERED AND ADJUDGED that the Motion For

Hearing (DE 44) filed by Bernard J. Dolenz  
be and the same is hereby DENIED.

DONE AND ORDERED in Chambers at Fort  
Lauderdale, Broward County, Florida, this  
15th day of January, 1988.

---

William J. Zloch  
U.S. Dist. Judge

Copies furnished:

Steven L. Perry, Esq.

Bernard J. Dolenz, J.D., M.D.

6102 Swiss Avenue

Dallas, TX 75214

(Filed January 15, 1988 with Robert M.  
March - Clerk U.S. District Court).

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF FLORIDA  
Cause No. 86-8384-CIV-ZLOCH  
STUART YACHT BUILDERS, INC.,  
a Florida Corporation,  
Plaintiff,

V.

ARIES STARTREK, ENROLLMENT NO. 555798,  
TOGETHER WITH ALL TACKLE AND APPAREL,  
Defendant.

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MOTION FOR HEARING REGARDING JURISDICTION  
AND SUPPORTING BRIEF

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NOW COMES, Bernard J. Dolenz, and moves  
for a Hearing regarding Jurisdiction in  
the case.

1. Bernard J. Dolenz is the owner of the  
Aries Startrek, the seized property, and  
his claim of ownership was sent on April  
3, 1987 with supporting documents.

2. The "boat" has never been complete,











United States District Court  
Southern District of Florida  
Case No. 86-8384-CIV-ZLOCH

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FILED JULY 5, 1989

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Stuart Yacht Builders, Inc.,  
a Florida Corporation,  
Plaintiff,  
V.

Aries Startrek, Enrollment No. 555798,  
together with all tackle and apparel, etc.  
in rem,  
Defendant.

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JUDGMENT FOR COSTS AND ORDER  
OF RELEASE AND/OR SALE

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THIS MATTER is before the Court, sua sponte, upon the Final Judgment (DE 51) entered in this cause on February 16, 1988, upon Plaintiff, Stuart Yacht Builders, Inc.'s, Motion for an Award of Costs (DE 52), upon the Affidavit (DE 65) of Gregory Noyes Burdick, Substitute Custodian, filed in support of costs and expenses incurred subsequent to the Final Judgment (DE 51), and the Affidavit of

Davie Lowe, IV, Edward Clifton, and Gregory Noyes Burdick, all bearing Clerk's Stamp dated June 19, 1989, and the Court has carefully reviewed said Final Judgment, Motion and Affidavits, has reviewed the court file and is otherwise fully advised in the premises. Accordingly, it is

ORDERED AND ADJUDGED as follows:

1. Plaintiff, Stuart Yacht Builders, Inc.'s Motion for an Award of Costs (DE 52) be and the same is hereby GRANTED and the Court hereby awards costs to Plaintiff incurred as Substitute Custodian from the February 16, 1988, judgment date through July 5, 1989, in the amount of \$20,433.93, for which let execution issue in accordance with the Final Judgment (DE 51) entered in this cause of February 16, 1988. This amount is calculated as follows:

a. Routine Maintenance (499 days x \$3.517/day [\$25.00/week])	\$1,754.98
b. Hull Insurance (16 17/31 months @ \$219.00/mo.)	3, 624.10
c. Mini Bay Storage (16 17/31 months @ \$121.90/mo.)	2,017.25
d. Storage Charges (\$.20/day/foot x 72/foot = \$14.40 x 499 days)	7,185.60
e. U.S. Marshall Insurance Premium (\$1,000.00 [3/88] + \$500.00 [10/88] + \$200.00 [12/88] + \$200.00 [2/89] + \$285.00 [4/89] + \$155.00 [5/89])	2,340.00
f. February 16, 1988 judgment amount of \$38,899.88 at the then effective legal Federal interest rate of 6.59% per annum, for 499 days	3,512.00
TOTAL	\$20,433.93

2. The Court, having given the prior Claimant, Melissa Keyes, her heirs, successors, or assigns, a right of first purchase, prior to sale by the U.S.

Marl al, of Defendant vessel, for an amount equal to the amount of Final Judgment (DE 51) (\$38,899.88) plus the subsequent costs and expenses awarded to the Substitute Custodian (\$20,433.93), hereby gives the prior Claimant, Melissa Keyes, her heirs, successors, or assigns, notice that it has thirty (30) days from the date of this Order in which to tender a cashier's check in the amount of \$59,333.81, to Steven L. Perry, Esq., counsel of record for Plaintiff, in full satisfaction of Plaintiff's claims to the Defendant vessel;

3. Upon the tender of said payment, Plaintiff shall immediately surrender the Defendant vessel to the prior Claimant, Melissa Keyes, her heirs, successors, or assigns, at which time Plaintiff shall be relieved of all further duties and responsibilities as Substitute Custodian in

the above-styled cause; and

4. At the expiration of this thirty day period, if the prior Claimant, Melissa Keyes, her heirs, successors, or assigns, have not tendered said payment, Plaintiff shall immediately undertake the necessary steps to accomplish the following:

a. The ARIES STARTREK, Enrollment No. 555798, together with all tackle and apparel, etc, in rem, shall be sold by the United States Marshal, Southern District of Florida, free and clear of all liens from preexisting claims on the vessel, whether recorded or otherwise, in accord with appropriate U.S. statutes and Supplemental Rules, Fed. R.Civ. P.;

b. Plaintiff shall be entitled to bid \$59,333.81;

c. Notice of such sale shall be made by advertisement pursuant to the Rules of the Court, and the reasonable cost of

such advertisement shall be advanced by Plaintiff and constitutes a taxable cost of this action. If the Plaintiff is the purchaser of the vessel, the clerk shall credit the Plaintiff's bid with the total sums due pursuant to the Judgment together with interest and any costs incurred subsequent to the Judgment;

d. The proceeds of such sale, upon confirmation by the Court, shall be paid by the United States Marshal into the Registry of the Court to await and abide further order of this Court; and

e. Upon holding the sale, a single Certificate of Sale, Certificate of Title and Certificate of Disbursement shall be filed, as to the vessel sold and the proceeds of the sale shall be applied to the Judgment of Record and to satisfy any costs incurred by Plaintiff subsequent to the Judgment. In the event that there is an excess above and beyond the Judgment

and costs, this amount shall be placed in the registry of the Court to be disbursed upon the application of the individuals claiming to be the owners of the vessel at the time this Judgment was entered.

DONE AND ORDERED in Chambers at Fort Lauderdale, Broward County, Florida, this 5th day of July, 1989.,

S/S  
William J. Zloch  
United States District Judge

Copies Furnished to:  
Steven L. Perry, Esq.,  
for Plaintiff

Melissa Keyes, Pro Se, Claimant  
c/o Turks Island Divers  
Hotel Kittina  
P. O. Box 281  
Grand Turk  
Turks and Caicos, British West Indies

IN THE UNITED STATES COURT OF APPEALS  
FOR THE ELEVENTH CIRCUIT

---

Nos. 89-5720 and 89-5852  
Non-Argument Calendar

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D. C. Docket Nos. 86-08384-CIV-WJZ,  
No. 86-8384-CIV-ZLOCH

STUART YACHT BUILDERS, INC.,  
a Florida Corporation,

Plaintiff-Appellee,

versus

ARIES STARTREK, ENROLLMENT NO.  
555798, together w/all tackel  
and apparel,

Defendant,

BERNARD DOLENZ,

Claimant-Owner-Appellant.

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Appeals from the United States District Cou  
for the Southern District of Florida.

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(August 20, 1990)

Before FAY, KRAVITCH and COX, Circuit Judges.

PER CURIAM: AFFIRMED. See 11th Cir. R. 36-1.



IN THE UNITED STATES COURT OF APPEALS  
FOR THE ELEVENTH CIRCUIT

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NOS. 89-5720 and 89-5852  
Non-argument Calendar

---

D.C. Docket Nos. 86-08384-CIV-WJZ,  
86-8384-CIV-WJZ

STUART YACHT BUILDERS, INC.,  
a Florida Corporation,  
Plaintiff/Appellee,

VS.  
ARIES STARTREK, ENROLLMENT NO.

555798, together w/all tackel

and apparel,

Defendant,

BERNARD DOLENZ,

Claimant/Owner/Appellant.

---

Appealed from the U.S. District Court  
for the Southern District of Florida.

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MOTION FOR RE-HEARING IN BANC

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Bernard J. Dolenz  
6102 Swiss Avenue  
Dallas, TX 75214  
214-821-0220  
TX Bar Card No. 05957750

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TO THE HONORABLE JUSTICES OF THE ELEVENTH  
CIRCUIT:

1. While the Court affirmed the Trial Court's judgment on August 20, 1990 pursuant to 11th Cir. R. 36-1, the Appellant is requesting a Re-hearing as the opinion rendered seems to be in such conflict with precedents of the Supreme Court and case law as to cause this to be brought to the attention of the entire Court.

2. In this regard, Federal Courts are of limited jurisdiction, and are empowered to hear only such cases as are within the judicial power of the United States, as defined in the Constitution and have been entrusted to them by a jurisdictional grant by Congress. Wright, LAW OF FEDERAL COURTS, p. 17. Whether a Federal Court has jurisdiction or not is such a fundamental issue that it can be raised

for the first time on appeal. 2 Am Jur 2d, 842, Section 202.

3. The Appellant contends that the Trial Court lacks jurisdiction, and the case should be dismissed as no admiralty law can attach to a vessel that has never been finished, commissioned, and is still under construction. As evidence are three documents that have been before the Court that reflect that this vessel was not complete. These documents are annexed, and are:

a. The U.S. Marshall's statement in the record showing that the "... vessel is incomplete, under construction, and empty of equipment..."

b. The Appellee's marine surveyor statement that the vessel was never completely finished or commissioned.

c. The Appellee's statement quoted in newspaper articles that the boat was

about 70% completed.

I.

THE APPEALS COURT ERRED IN GIVING AFFIRMANCE WITHOUT OPINION AS THE FINDINGS OF FACT AND CONCLUSIONS OF LAW ARE ERRONEOUS.

In this regard, Findings of Fact 1, 5, 14, and Conclusions of Law 1, 4, 5, 6, 7, 9, and 10 were all controverted and arguments were given in the Appellant's Brief.

II.

THE APPEALS COURT ERRED AS THE JUDGMENT HAD SEVERAL ERRORS OF LAW; THE MOST GLARING BEING THAT THE TRIAL COURT HELD THAT IT HAD JURISDICTION, WHEN IN FACT IT COULD NOT HAVE JURISDICTION IN ADMIRALTY OVER AN UNFINISHED OR UNCOMMISSIONED BOAT.

If there is no basis under 28 USC, Section 133 or 46 USC, Section 971, then

jurisdiction fails as a maritime contract is necessary to invoke jurisdiction under those statutes. If there is an exception where an unfinished or uncommissioned vessel can come under the purview of those statutes, this Appeals Court should address it as for over a century, supplying materials for construction of a vessel is not a maritime contract. PEOPLE'S FERRY CO. V. BEERS, (1857) 61 US (20 How.) 393, 15 L Ed, 961.

"Even after the vessel was launched, while she is not yet sufficiently advanced to discharge the functions for which she is designed, the materials, work, and labor for her completion are not the subject-matter of admiralty jurisdiction". THAMES TOWBOAT CO. V. THE FRANCIS McDONALD, (1920) 254 US 242, 65 L Ed 245 41 Sup Ct. Rep. 65.

Here, the Appellee admits in the news-

papers and affirms in its billing that it was to finish this unfinished vessel. Therefore, this case has no business in admiralty as the contract does not deal directly with navigation of commerce on navigable waters. GENERAL ENGINE & MACH. WORKS, INC. V. SLAY, D.C. Ala. 1963, 222 F. Supp. 745.

An inspection of the Appellee's billings and statements confirm that exploratory carpentry, design and engineering, keel fabrication, design engineering and consultation, placing in a steering system, and alterations to the vessel all relate to the original construction of the vessel.

This contract, being one for services of a ship, does not furnish a basis for a claim within the admiralty jurisdiction provided for in 28 USCS Section 1333(1).

In BOND V. F/V MERMAID (1970, DC Fla) 311 F. Supp 1013, a naval architect filed a complaint in rem against a vessel for alterations and additions to its plans ordered by the owners of the Defendant vessel, asserting admiralty jurisdiction, but the Court found that the extra work performed, that is, drafting, conferences, calculations, and the like, all related to the original construction of the vessel, and that services furnished under the later agreement for changes were supplied in contemplation of completing the original undertaking for the design and supervision of the vessel's construction.

This contract, being one for services furnished in the construction of a ship, does not furnish a basis for a claim within the admiralty jurisdiction provided for in 28 USCS Section 1333(1), the

Court concluded.

### III.

THE APPEALS COURT ERRED AS THEIR OPINION WOULD HAVE PRECEDENTIAL VALUE, AND AN OPINION SHOULD BE RENDERED REGARDING HOW AN UNFINISHED AND UNCOMMISSIONED VESSEL CAN SATISFY THE JURISDICTIONAL REQUIREMENT OF INVOKING ADMIRALTY LAW IN FEDERAL COURT.

The Appellant contends that the Court is unable to find any case law that would give Federal Courts jurisdiction over an unfinished or uncommissioned vessel, and that it would be in error for the Appeals Court to not dismiss this case for lack of jurisdiction.

Lack of jurisdiction may be raised at any time, even upon a second appeal of an action in which the point was never raised in the Trial Court, and was not advanced in a previous appeal (Flota



Maritima Browning de Cuba, Sociedad Anonima v. Snobl (1966, CA4 Md) 363 F 2d 733, cert den 385 US 837, 17L Ed 2d 71, 87 S Ct. 82), AND WHEN RAISED MUST BE EXAMINED AND DECIDED (Armstrong Cork Co. v. Farrell Line Inc. (1948, DC Pa) 81 F Supp 848). (Emphasis added).

Here, the Appellant, pursuant to ARMSTRONG CORK, supra, contends that the Appeals Court should decide the jurisdictional issue and give a determination that an unfinished and uncommissioned vessel cannot have jurisdiction in Federal Court.

#### IV.

THE APPEALS COURT ERRED AS THEIR OPINION WOULD HAVE PRECEDENTIAL VALUE IN SHOWING HOW THE APPELLANT HAD DUE PROCESS TO DEFEND THE DEFENDANT VESSEL, EVEN THOUGH THE TRIAL COURT WOULD NEVER GRANT A HEARING EVEN THOUGH REPEATEDLY REQUESTED

TO DO SO.

The Appellant has never met the Judge, and has never had a hearing before the Court, even though requested by Motion for Hearing. This conduct seems strange, and appears violative of the 5th and 14th Amendments.

#### CONCLUSION

The Appellant prays that this Honorable Court will set in banc and review the jurisdictional aspects and find upon the review that the Federal Trial Court below lacked jurisdiction, and that all judgments and orders be voided by that Court for lack of jurisdiction, and for general relief.

Respectfully submitted,

Bernard J. Dolenz

CERTIFICATE OF SERVICE

This is to certify that a copy of the foregoing instrument has been sent by regular mail on this the 28th day of August, 1990 to Thomas D. Lardin c/o Steven Perry, P. O. Drawer 24, Stuart, FL 33495.

Bernard J. Dolenz

STUART YACHT BUILDERS, INC.

ARIES STARTREX, ENROLLMENT NO. 555790, TOGETHER WITH  
ALL TACKLE AND APPAREL86-8584-CV-7100  
TYPE OF PROCESS  
CIVIL-IN REM

SERVE

NAME OF INDIVIDUAL COMPANY, CORPORATION, ETC., TO SERVE OR DESCRIPTION OF PROPERTY TO SEIZE OR COMMISSION

ARIES STARTREX

ADDRESS (Street or RFD, Apartment No., City, State and ZIP Code)

450 S.W. Salerno Rd., Stuart, Florida 33494

N. F.D. BADGE (P.R.) 107

AT

SEND NOTICE OF SERVICE COPY TO REQUESTER AT NAME AND ADDRESS BELOW:

CRARY, BUCHANAN, BOWDISH &amp; BOVIE, CHTD.

ATTN: STEVEN L. PERRY

555 Colorado Avenue, Suite One

Stuart, Florida 33495

Number of process to be  
served with this Form - 285

1

Number of parties to be  
served in this case

1

Check for service  
on U.S.A.

2

SPECIAL INSTRUCTIONS OR OTHER INFORMATION THAT WILL ASSIST IN EXPEDITING SERVICE (Include Business and Alternate Address, Telephone Numbers, and Estimated Times Available For Service):

The vessel is located at the above address. This is the business address of the Plaintiff and service may be arranged at any time including weekends by contacting the Plaintiff at 283-1947.

Signature of Attorney or other Originator requesting service on behalf of:

PLAINTIFF  
DEFENDANTTELEPHONE NUMBER  
(305) 287-2600DATE  
6-30-86

SPACE BELOW FOR USE OF U.S. MARSHAL ONLY - DO NOT WRITE BELOW THIS LINE

I acknowledge receipt for the total  
number of process indicated.  
I serve only first USM 285 if more  
than one USM 285 is submitted.

Total Process

District  
of OriginDistrict  
to Serve

Signature of Authorized USMS Deputy or Clerk

Date

No. 04

No. 04

7-5-86

U.S. Marshal

I hereby certify and return that I ☐ have personally served, ☐ have legal evidence of service, ☒ have recused as shown in. Remarks: the process described on the individual, company, corporation, etc., at the address shown above or on the individual, company, corporation, etc., shown at the address to be served below.☐ I hereby certify and return that I am unable to locate the individual, company, corporation, etc., named above (See remarks below)

Name and title of individual served (if not shown above)

BURDICK

Address (complete only if different than shown above)

☐ A person of suitable age and discretion then residing in the defendant's usual place of abode

Date of Service

Time

7-5-86

6:00 pm

Signature of U.S. Marshal or Deputy

Rudolph F. Fackel

Service Fee

Total Process Fee

Forwarding Fee

Total Process Fee

Advance Deposit

Amount paid to U.S. Marshal

Amount of Refund

6.00

6.00

6.00

6.00

6.00

6.00

6.00

REMARKS:

7/10/86

ARRESTED THE ABOVE

OCEAN GOING CATAMARAN CASE

ATTACHED INVENTORY.) VESSEL IS

INCOMPLETE UNDER CONSTRUCTION

AND EMPTY OF EQUIPMENT.

(DR 7)

# MARINE SPECIALIST

Ray Seese

40 SW Hideaway Place  
Stuart, FL 33497

~~~~~ Consulting ~~~~~

## SURVEY REPORT

### SUMMARY:

...This vessel ...has never been completely finished or commissioned... Modifications to the vessel are being considered...The vessel has no standing or running rigging...The work to complete and commission this vessel is being done by Stuart Yacht Builders of Stuart, Florida. It is recommended that when the vessel is completed a survey to update these findings and a sea trial be conducted.

(Statements of Plaintiff's expert)

# One of world's largest catamarans is in Stuart

• From page A1

purchased it.

The family worked on the boat for several years, doing the electric work, plumbing, and painting, and even putting some of the finish work on the deck.

Mr. York estimates the boat is about 75 percent completed.

But for personal reasons the couple was unable to finish the job and two years ago they moved out of the state, leaving the boat in the hands of a small group of the Yorks.

The family, which, through, built the boat, is now in the process of completing the construction of the boat.

The boat is now in the hands of a small group of the Yorks.

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THE UNITED STATES COURT OF APPEALS  
FOR THE ELEVENTH CIRCUIT

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Filed October 16, 1990  
No. 89-5720  
89-5852

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STUART YACHT BUILDERS, INC.,  
Plaintiff-Appellee,  
V.  
ARIES STARTREK,  
Defendant,  
BERNARD DOLENZ,  
Claimant-Owner-Appellant.

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On Appeal from the United States District  
Court for the Southern District  
of Florida

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ON PETITION(S) FOR REHEARING AND SUGGES-  
TION(S) OF REHEARING EN BANC

(Opinion August 20, 1990, 11th Cir.,  
198\_\_, F.2d\_\_).  
(October 16, 1990)

Before: FAY, KRAVITCH and COX,  
Circuit Judges.

PER CURIAM:

(X) The Petition(s) for Rehearing are  
DENIED and no member of this panel nor  
other Judge in regular active service on  
the Court having requested that the court  
be polled on rehearing en banc (Rule 35,

Federal Rules of Appellate Procedure; Eleventh Circuit Rule 35-5), the Suggestion(s) of Rehearing En Banc are DENIED.

( ) The Petition(s) for Rehearing are DENIED and the court having been polled at the request of one of the members of the Court and a majority of the Circuit Judges who are in regular active service not having voted in favor of it (Rule 35, Federal Rules of Appellate Procedure; Eleventh Circuit Rule 35-5), the Suggestion(s) of Rehearing En Banc are also DENIED.

( ) A member of the Court in active service having requested a poll on the reconsideration of this cause en banc, and a majority of the judges in active service not having voted in favor of it, Rehearing En Banc is DENIED.  
ENTERED FOR THE COURT:  
S/S  
Phyllis Kravitch  
United States Circuit Judge



